In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 817

BENTLEY L. HOLT AND BONNIE J. HOLT,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This case presents the question whether a non-competent Indian is subject to federal income tax on the gains derived from the sale of cattle raised on tribal lands which had been leased to him under an Indian rehabilitation program.

Petitioner[1] is a full-blooded member of the Cheyenne River Tribe of the Sioux Indians, and is classified as a non-competent ward of the federal government. During 1958 he derived income from ranching and farming operations on 3,520 acres of land located

[1] Mrs. Holt, a non-Indian, is a party only because she filed a joint income tax return with her husband for the taxable year 1958; Mr. Holt will be referred to as petitioner.

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on the Indian reservation. This land fell into three categories: (1) 320 acres held by petitioner in fee simple; (2) 1,440 acres allotted to him by the Tribe; (3) 1,760 acres of tribal land leased to petitioner. (Pet. 12.)

Petitioner concedes that he is liable for income tax on the profits from the 320 acres held by him in fee simple; the government concedes that income from the 1,440 acres of allotted land is exempt from tax. The only dispute here concerns the income derived from operation of the 1,760 acres of tribal land leased to petitioner. (Pet. 12.)

Petitioner obtained the grazing permit over the 1,760 acres of tribal land in December, 1956, along with a rehabilitation loan of $10,000. This loan was made pursuant to the Tribe's Rehabilitation Plan[2] under which land, bulls, heifers, and production material were furnished by the tribe to interested members, with ultimate repayment in the form of cattle and cash. (Pet. 16, 3–5.)

In 1958 petitioner realized a $4,452 profit from cattle raised on this 1,760 acres of tribal land. The Tax Court held this income subject to federal taxation, and the court of appeals affirmed (Pet. 11–17).

1. The Internal Revenue Code taxes all income from whatever source derived. Internal Revenue Code of 1954, § 61(a). This Court has long held that the Indians are subject to the income tax unless a treaty or statute has "clearly expressed" an exemption for

[2] This plan was approved by the Commissioner of the Bureau of Indian Affairs on February 6, 1956, under authority delegated by the Act of September 3, 1954, c. 1260, 68 Stat. 1191.

some type of income. See *Squire* v. *Capoeman,* 351 U.S. 1, 6; see also *Superintendent* v. *Commissioner,* 295 U.S. 418, 419–420; *Choteau* v. *Burnet,* 283 U.S. 691, 693, 696; *Heiner* v. *Colonial Trust Co.,* 275 U.S. 232, 234–235.

No treaty or statute exempts from taxation the income derived from cattle operations on leased tribal land. The Act of March 2, 1889, c. 405, 25 Stat. 888, § 11 (App. *infra,* p. 7) is substantially the same in all material respects as § 5 of the General Allotment Act of 1887, which this Court considered in *Squire* v. *Capoeman, supra.* In that case, the Court observed that the statute guaranteed that lands allotted to the Indians and held in trust for them by the United States would eventually be delivered to them free and clear of all charges and encumbrances whatsoever. The Court construed this statute as exempting from taxation profits derived from land allotted to an Indian, so long as the land was held in trust for him by the United States.

In the instant case the United States has conceded that the income earned by petitioner on the 1,440 acres of land allotted to him and held in trust for him by the United States is exempt from taxation under *Squire* v. *Capoeman.* However, there is nothing in the statute to exempt income earned by petitioner on the 1,760 acres of land which he held under lease. The United States has made no guarantee to deliver the title of such lands to him free and clear of all charges and encumbrances. As to such lands, petitioner is no different than any other lessee of the tribal lands, Indian or non-Indian. This Court has long held that

an Indian's income is not tax-exempt merely because he is a ward of the United States and his income is held in trust for him. *Superintendent* v. *Commissioner, supra.*

Petitioner quotes (Pet. 8) from Cohen, *Handbook of Federal Indian Law* (1942), p. 265, to the effect that "It is clear that the exemption accorded tribal and restricted Indian lands extends to the income derived directly therefrom." Of the three cases cited by Cohen to support the quoted statement (*id.*, fn. 98), two involved allotted lands and statutes similar to those in *Capoeman* exempting allotted lands from taxation until a patent in fee was issued.[3] The third case, *Blackbird* v. *Commissioner,* 38 F. 2d 976 (C.A. 10), has been disapproved by this Court in *Superintendent* v. *Commissioner, supra,* pp. 419–420, and in *Federal Power Commission* v. *Tuscarora Indian Nation,* 362 U.S. 99, 116–117. This Court's citation of the Cohen quotation in *Squire* v. *Capoeman, supra,* p. 9, related only to the question of whether the income from allotted rather than tribal lands was tax exempt.

Moreover, even if the income from tribal land was tax exempt, petitioner would not prevail here. Such a rule would do no more than exempt the tribe from tax on the rental it received from petitioner under the lease and exempt the members of the tribe (including petitioner) from tax on their shares of the rental pay-

[3] See *United States* v. *Homeratha,* 40 F. 2d 305 (W.D. Okla.), appeal dismissed, 49 F. 2d 1086 (C.A. 10), and *Pitman* v. *Commissioner,* 64 F. 2d 740 (C.A. 10).

ments. But such a rule would not exempt from tax the net income earned by a lessee of tribal land, such as petitioner.

2. Nor are petitioner's profits from cattle operations on the leased land exempted from taxation because he obtained a loan in order to finance these operations. Contrary to petitioner's contention (Pet. 9), the Act of September 2, 1954, c. 1260, 68 Stat. 1191, § V (App. *infra*, pp. 7–8) grants no tax exemption for income derived from business operations financed by money borrowed under the rehabilitation program. If Congress had wished both to loan money to the Indians and to exempt from taxation the profits earned with the borrowed money, it could easily have said so. This Court has repeatedly refused to find an implied tax exemption for Indians and has long required a "clearly expressed" statutory exemption. See cases cited *supra*, p. 3.

3. There is no merit to petitioner's final contention (Pet. 9–10) that taxation of the income here in question would interfere with a federal instrumentality because the tribe holds title to the financed cattle. As the court of appeals noted (Pet. 17), title to the cattle is held by the tribe as security for the $10,000 loan to petitioner. Petitioner can obtain full and unrestricted title to the cattle at any time by repaying the loan. The two cases relied on by petitioner (Pet. 9) are completely inapposite.[4] As the court below recognized (Pet. 17), both involved the question

[4] *United States* v. *Rickert*, 188 U.S. 432; *United States* v. *Dewey County*, 14 F. 2d 784 (D. S.D.), affirmed, 26 F. 2d 434 (C.A. 8).

whether a State could tax property on an Indian reservation.

There is no conflict of decisions, and no other reason for review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1967.

APPENDIX

Act of March 2, 1889, c. 405, 25 Stat. 888, 891:

> SEC. 11. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the lands thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever, and patents shall issue accordingly. * * *

Act of Setember 3, 1954, c. 1260, 68 Stat. 1191, 1192:

> SEC. V. In addition to the sum set out in section II hereof, the United States further agrees that it will appropriate and make available a further sum in the total amount of $5,160,000 which shall likewise be deposited in the Treasury of the United States to the credit of said Indian Tribe to draw interest on the principal thereof at the rate of 4 per centum per annum until expended for the purpose of complete rehabilitation for all members of said Tribe who are residents of the Cheyenne River Sioux Reservation at the time of the passage of this Act, whether or not residing within the taking area of the Oahe Project, and for relocating and reestablishing members of said Tribe

who reside upon such lands conveyed to the United States to the extent that the economic, social, religious, and community life of all said Indians shall be restored to a condition not less advantageous to said Indians than the condition that the said Indians now are in: *Provided,* That said fund provided for in this section shall be expended upon the order and direction of the Tribal Council of said Tribe, with the approval of the Secretary of the Interior, for the purposes set forth in this section: *Provided further,* That the authorization contained in section XVI hereof shall remain available for a period not to exceed ten years from the effective date of this Act.

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